VIRGINIA LAW REGISTER

R. T. W. DUKE, JR., *Editor.*

BEIRNE STEDMAN, *Associate Editor.*

Issued Monthly at $5 per Annum. Single Numbers, 50 cents.

All Communications should be addressed to the PUBLISHERS

The Albemarle Bar, XIX.

James Lindsay Gordon was born in Virginia on January 6th, 1860. He was a son of George L. Gordon, a son of the distinguished General William L. Gordon of Albemarle County, Virginia. His father, George L. Gordon entered the Confederate Army and was killed at the Battle of Malvern Hill. James attended private schools and then entered William and Mary College and subsequently the University of Virginia, at which latter place he studied law and was admitted to the bar in Charlottesville in 1881. He practiced his profession in Charlottesville, Virginia, from that date up to 1893, serving three years in the Virginia State Senate and declining a re-nomination. In 1893 he removed to the city of New York, where he resided and practiced law up to the date of his death in 1904. He soon took a very prominent place at the New York Bar and was Assistant District Attorney for the state of New York, and at the time of his death was Assistant Corporation Counsel for that city. He was probably one of the most brilliant political and forensic speakers in the state of Virginia, and was repeatedly called upon to deliver addresses in the most prominent institutions of the South. He delivered the Alumni address at the University of Virginia and at William and Mary College, and spoke before the Southern Society of Atlanta, Georgia, and the graduating classes of Randolph-Macon College and the University of Vermont. He was a poet of high order and it is to be much regretted that he did not devote himself more to this branch of literature, for which he was singularly fitted. A small volume of poems entitled "Ballads of the Sunlit Years" was published after his death and contains some of the most beautiful things ever written by any Southern poet. He was an exceedingly handsome man and one of the most lovable and genial char-

acters. His early death removed a man not only of the most brilliant promise but one singularly beloved by all who knew him.

He was survived by one daughter.

Daniel Harman, Esquire, was born in the city of Alexandria, Virginia, on the 7th of November, 1859, his father, Daniel Harman, Sr., being a prominent business man of that city, and his mother a Miss Wood, the sister of John Wood, Jr., of Charlottesville, Virginia, a prominent financier and insurance man. When Daniel was about eighteen months of age his father removed to the city of Charlottesville, and in that city, or its immediate vicinity, Mr. Harman resided until his death on the 27th day of April, 1912.

He studied under Major Horace W. Jones and Armistead C. Gordon, and in 1880 entered the University of Virginia, graduating in law in 1882. He entered into the practice of the law in the city of Charlottesville a few years later with John W. Davis, a partnership which continued until Mr. Davis removed to the state of Texas. At a very early date Mr. Harman took a prominent position at the Albemarle Bar, and while always courteous and deferential to his elder brethren, the ablest members of the bar soon found they had a foeman worthy of any man's steel. He was noted for the care and skill with which he prepared his legal papers, and he proved a dangerous antagonist to those who were slipshod or careless in pleading. His power and earnestness before a jury were remarkable and he grew in strength and ability from year to year until at the time of his death he was considered one of the foremost lawyers of his time in the state of Virginia. Whilst he had a quick, keen and subtle mind, he was a very hard worker and never jumped at conclusions but worked out his cases with the greatest care and zeal. He was noted for the calmness with which he took success, but was equally calm whenever he lost a case and seemed to note his failures for future use. Whilst frail in body he never seemed to realize that he required any rest or relief and it may be almost said that he literally worked himself to death. He died a few minutes after making one of his ablest arguments and within a short time after the case had been decided in his favor.

In 1909 Mr. Harman associated himself in his practice with Mr. H. W. Walsh and the firm did a large practice both in the

lower and superior courts, State and Federal. In 1896 he was appointed a member of the Board of Visitors of the University of Virginia and served as chairman of the executive committee of that body, and was chairman of the committee charged with the re-building of the University after the fire of 1896. He connected himself with the Presbyterian Church of the city of Charlottesville and took an active part in the work of his church.

Mr. Harman married a Miss Murphy of Charlottesville, who survives him, with a family of four boys and three girls. He died in the prime of life and usefulness, but left behind him a memory in every way worthy of the traditions of the great bar of which he was a member.

With these sketches the writer ends the biography of the members of the Albemarle Bar who have passed from earth. In the next number of the REGISTER he proposes to bring the series to a conclusion by making a summary of the high positions occupied by members of this Bar, as well as noting the services of the lawyers in the Civil and World War.

The New "Mann" Act—Are Our Public Officials Inefficient?—Is Violation of the Prohibition Act a Worse Offense than Murder?

When one picks up the new Prohibition Act, which went into effect June 18th, 1922, one is startled by its length and so amazed at some of its provisions that those of us who are Virginians of the old school wonder if the glorious old Commonwealth of our fathers yet survives. The act contains fifty-six pages. It requires an elaborate index of fourteen pages, and the Ouster Act, which is put in as a sort of appendix, adds two more pages to it. An additional expense is entailed upon the State by having five thousand copies of this act printed in pamphlet form, although it seems to us the various amendments to the original act would hardly require such a course. Many of these provisions seem to us subversive of much that men of an older, if not of a better day, thought essential to the liberty of the people; and the distrust of the officials of the State who are under a solemn oath to see that it is enforced to the letter, regardless of their own individual views, is humiliating, to say the least of it,

to those who take pride in the uprightness, integrity and high sense of public duty which have ever characterized our State and county officials. A careful inspection of its provisions would show that the General Assembly again desired to emphasize the fact that all public officials were charged with a *peculiar* duty in regard to this act. See Section 55. It is true that this clause was in the original act. Have the officials been so remiss that it was deemed necessary to repeat it? Why is this not in every act, making offenses against the law punishable? Unless our legislators were afraid that an act of this nature, with so many provisions would be overlooked. Why has not the special attention of the officers of the State been called to their duty to prosecute murder, arson, theft and the many misdemeanors made so by the law? Is it possible that the violation of the Prohibition Act is an offense worse than murder, etc.? If it was believed that the officials of the State would not do their duty in respect to this act, as in all others, ought they not to be removed as unworthy servants?

Then it seems to us a most grave and serious error is committed in making the fees for arrests, prosecution, etc., larger *in cases of conviction;* giving as it were a "contingent fee" to officers of the State in criminal cases. He is a poor—aye a corrupt—official, who would urge a conviction because he got a larger fee in such event. It will be remembered that a good many years ago the law only allowed a fee to the Attorney for the Commonwealth in prosecutions for misdemeanors in case of conviction, but public sentiment was so strong against such a law that it was changed. A public official ought not to have any interest whatever in the result of a criminal prosecution, except the interest of doing his duty to his state, the law and himself.

Then fees out of all proportion to the offense are allowed officers for doing their simple duty. The sheriff or constable who arrests a murderer or one guilty of the most heinous crime no matter what risks he runs, or danger to which he is exposed is only allowed a fee of one dollar and fifty cents. Under the Mann Act as revised, fees as high as fifty dollars are allowed officials for seizing a still and arresting the party owning or operating the same, but if the fifty dollars cannot be made out of the party arrested, then twenty-five dollars is allowed the official. He is

also allowed the sum of ten dollars for the seizure and confiscation of a copper still and two dollars and a half for the capture of any still made of material other than copper, whether or not the operator is arrested or convicted, provided that such still has a capacity of not less than five gallons.* The attorney for the Commonwealth is allowed by the general law ten dollars in all felony cases except those in which the death penalty can be inflicted, and then the fee is fixed at twenty dollars; but under the provisions of this act, Section 21½, the attorney for the Commonwealth is allowed a fee of ten dollars in one case and twenty-five in another, *upon the conviction of the party accused.* Thus again restoring the same vicious system of contingent fees in criminal cases. Can it be possible that the Legislature of this State had so poor an opinion of the Attorneys for the Commonwealth that it imagined a paltry increase in the fees would make the State attorneys more diligent in doing their duty. If they thought so they ought to have abolished the office, so that those now holding it could hold it no more and better men be put in their places.

Then the exceedingly dangerous provision is to be found in Section 35, which allows officers charged with enforcement of prohibition laws, without a warrant, to enter freight yards, passenger depots, baggage and storage rooms of any common carrier, and to enter any train, baggage, express or freight car, and any boat, flying machine, automobile, submarine, etc., and any billiard, pool room or bowling alley, without a warrant, and making no warrant necessary to inspect any baggage found in an automobile or other vehicle herein named. The danger of this clause to the public travelling in automobiles or other conveyances is very serious, and a similar act in other states has allowed more than one holdup by highway robbers. Whilst arrests by an officer for every other misdemeanor without a warrant unless actually committed in his presence are not permitted, yet we find offenses against the Prohibition Law put in a category entirely by themselves. By Section 55 offenses against this law, as far as fees are concerned, are put upon a higher basis than felonies; and whilst the highest fee paid to the attorney for the

*The attorney for the commonwealth is allowed a fee of ten dollars in this same matter.

Commonwealth in the most horrible murder case is twenty dollars, the attorney for the Commonwealth is allowed twenty-five dollars, under that act, if the money can be made out of the defendant; if not out of the defendant, then the fee is the same as in felony cases. We have alluded to the fact that an officer arresting in murder cases is allowed only the fee of $1.50, but under Section 55 of the act, for an arrest for violation of any of the provisions of the Prohibition Law the officer is paid ten dollars. But it must be remembered that as the law stands it is the law. It is the duty of every official to enforce it without fear, favor or hope of reward, and we have enough confidence in the officials of this State to believe that it will be enforced as far as possible; but certainly public sentiment should be aroused to the dangers contained in the act, which in our judgment are almost as great as those arising from the intemperate use of intoxicating liquors. The general public, looking only at the evils of the improper use of ardent spirits—and no one denies that they are great—seems to overlook the fact that a cure is sometimes worse than the disease itself. The whole trouble grows out of the fact that public sentiment is not educated up to the necessity of obeying every law, including one of this character; but the way in which its provisions are disregarded by even the most honest and upright people in our communities is only a proof of the truth of what Tacitus said in speaking of an army which unwillingly and awkwardly obeyed its generals only from fear of punishment. *"Sed ut qui mallent jussa Imperatorium interpretari quam exequi.* As long as men only obey a law of this character from fear the law will continue to be violated."

Dissenting Opinions Again.

Apropos of the editorial on The Amenities of Dissent in the July number of the REGISTER and the very interesting article of the Hon. R. Walton Moore which will appear in our next number, we find Mr. Justice McKenna used somewhat vigorous language in his dissenting opinion in *Grogan* v. *Walker & Sons* and in another case heard with it, reported in U. S. Supreme Court Advanced Opinions for

June 15th, 1922, p. 511. In this case the Supreme Court, JJ. McKenna, Day and Clarke dissenting, decides as follows:

1. The transportation of intoxicating liquors from a Canadian port through the United States to a foreign port, in accordance with U. S. Rev. Stat. § 3005, and the Treaty with Great Britain of May 8, 1871, is prohibited by the provision of U. S. Const., 18th Amend., forbidding the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from, the United States and all territories subject to the jurisdiction thereof, for beverage purposes, and the Volstead Act of October 28, 1919, § 3, declaring that, except as therein authorized, no person shall manufacture, sell, barter, transport, export, deliver, furnish, or possess any intoxicating liquor.
2. The transshipment of intoxicating liquor from one British ship to another in New York harbor is prohibited by the provisions of U. S. Const., 18th Amend., forbidding the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from, the United States and all territories subject to the jurisdiction thereof, for beverage purposes, and the Volstead Act of October 28, 1919, § 3, declaring that, except as therein authorized, no person shall manufacture, sell, barter, transport, import, export, deliver, furnish, or possess any intoxicating liquor.

In dissenting, Justice McKenna speaks in no uncertain terms. The concluding paragraph of his opinion is decidedly spicy to say the least of it. We quote:

> In United States *v.* Gudger, 249 U. S. 373, 63 L. Ed. 653, 39 Sup. Ct. Rep. 323, it was decided that the *transportation* of liquor through a state was not *transportation* into it, within the meaning of a provision in the Postoffice Appropriation Bill. To me the case is decisive of those at bar.
>
> With the suggestion of it and the other cases in our minds, let us consider what meaning and purpose are to be assigned to the 18th Amendment and the Volstead Act. It is certainly the first sense of every law that its field of operation is the contrary of its enactment. American Banana Co. *v.* United Fruit Co., 213 U. S. 347, 53 L. Ed. 826, 29 Sup. Ct. Rep. 511, 16 Ann. Cas. 1047. And this is true of the 18th Amendment and the Volstead Act; and necessarily they get their meaning from the field and purpose of their opera-

tion,—from the conditions which exist in that field or designed to be established there. The transportation that they prohibit is transportation within that field,—that is, the United States,—and "for beverage purposes." The importance of the purposes suggests the emphasis of italics, and the Volstead Act is at pains to declare that it shall be construed "to the end that the use of intoxicating liquor as a beverage may be prevented."

The transportation and the purposes are, therefore, complements of each other, and both must exist to fulfil the declared prohibition. Neither exists in the cases at bar,—the transportation in neither is, in the sense of the Amendment and act, "within" the United States "for beverage purposes." In one it is through the United States, in the other transshipment in a port of the United States, and both under the direction and control of the revenue officers of the United States, and for use in other countries than the United States. Not only, therefore, are the cases not within the prohibition of the 18th Amendment or the Volstead Act, but they are directly within § 3005 of the Revised Statutes and the Treaty with Great Britain. In the view of the court, however, the section and the treaty have been extinguished,—superseded by a world-wide reform that cannot tolerate any aid by the United States to the offensive liquor.

The 18th Amendment," is the declaration, "meant a great revolution in the policy of this country," and did not timidly confine itself "to the use of intoxicants in this country." There is appeal in the declaration. It presents the attractive spectacle of a people too animated for reform to hesitate to make it as broad as the universe of humanity. One feels almost ashamed to utter a doubt of such a noble and moral cosmopolitanism, but the facts of the world must be adduced and what they dictate. They are the best answer to magnified sentiment. And the sentiment is magnified. The Amendment and the Volstead Act were not intended to direct the practices of the world. Such comprehensive purpose resides only in assertion and conjecture, and rejects the admonitory restraint of § 3005, the Treaty with Great Britain, and the noninterfering deference that nations pay to the practices of one another.

If such mission had been the purpose, it would have been eagerly avowed, not have been left to disputable inference. Zeal takes care to be explicit in purpose, and it cannot be supposed that § 3005 and the treaty were unknown, and their relation—harmony or conflict—with the new policy,

and it must have been concluded that there was harmony, not conflict. The section and the treaty support the conclusion. The section permits all merchandise arriving at certain ports of the United States, and destined for places in the adjacent British provinces, and arriving at certain ports and destined for places in Mexico, to be entered at the customhouse, and conveyed in transit through the United States. In a sense, it has its complement in § 3006, which gives to merchandise of the United States the same facility of transportation through the British provinces or the Republic of Mexico.

The treaty (article 29) provides a reciprocation of privileges. Merchandise arriving at ports in the United States, and destined for British possessions in North America, may be entered at the proper customhouse, and conveyed in transit through the United States, without payment of duties. A like privilege is given United States merchandise arriving at ports in the British possessions, for transit through those possessions.

In other words, the treaty is an exchange of trade advantages, —advantages not necessary to the commerce of either, but affording to that commerce a facility. And yet, it is said that it is the object of the 18th Amendment to take away that facility, and to take away the transshipment of liquor in an American port from one British ship to another. This is the only accomplishment! What estimate can be put upon it? It takes away not a necessity of British commerce, as I have said, but a convenience to it, in disregard of a concession recognized by law and by a treaty. And upon what prompting? Universal reform? If so, why was the Panama canal given up as a convenience to the prohibited beverage, and apparently with purposeful care? There is a perversion in one or the other of those actions that needs to be accounted for. There seems to be a misunderstanding of their respective effects,—an overlooking of their antagonism,—if the purpose of our legislation be a reversal of things not only in the United States, but elsewhere. To deny the distribution of intoxicants by forbidding them transit through the United States, and affording them distribution through the Panama canal, cannot both be conducive to the world-wide reform which the court considers was the mission instituted by the 18th Amendment, and put in execution by the Volstead Act.

It is said, however, that, regarding the United States alone, the Amendment and the act have a practical concern. If

> liquor be admitted for transit, is the declaration, some may stay for consumption. The apprehension is serious,—not of itself, but because of its implication. It presents the United States in an invidious light. Is it possible that its sovereignty, and what it can command, cannot protect a train of cars in transit from the Canadian border to the Mexican border, or the removal of liquors from one ship to another, from the stealthy invasions of inordinate appetites or the daring cupidity of bootleggers? But, granting that the care of the government may relax, or its watchfulness may be evaded, is it possible that such occasional occurrences, such petty pilferings, can so determine the policy of the country as to justify the repeal of an act of Congress, and violation or abrogation of its treaty obligation by implication?
>
> I put my dissent upon the inherent improbability of such intention; not because it takes a facility from intoxicating liquor, but because of its evil and invidious precedent; and this at a time when the nations of the earth are assembling in leagues and conferences to assure one another that diplomacy is not deceit, and that there is a security in the declaration of treaties, not only against material aggression, but against infidelity to engagements when interest tempts or some purpose antagonizes. Indeed, I may say there is a growing aspiration that the time will come when nations will not do as they please and bid their wills avouch it.

It seems to us that this dissenting opinion is very cogent and hard to answer from any possible standpoint. But, as we have often said, no one need be surprised at any law or decision when prohibition is under consideration. That Mr. Justice McKenna's dissent is a strong and able presentation of what ought to be the law seems to us, the fact.

Errata.

In giving the dates of the birth and death of Col. Prentis in our July number we made a mistake. Col. Prentis was born April 11th, 1819, and died November 23rd, 1871.